

SJ 7 Workgroup
Meeting Minutes
February 20-21 2008

February 20, 2008

Work group members present: Betty Beverly, Grace Bowman, Webb Brown, George Groesbeck, Mike Hanshew, Rose Hughes, Karolyn Redding, Bob Ross, Al Ward (Claudia Clifford), Jeff Buska, Jill Caldwell, Becky Fleming-Siebenaler.

Welcome & Brief Summary of Last Meeting.

Jeff Buska opened the meeting and briefly identified and discussed the agenda for the next two days, and the handouts that were provided to the work group (handouts and agenda attached). The handouts are: Summary of December work group consensus on definitions for discussion; Follow-up Phone Interviews for the Work Group's Identified Ten States; Ten State Summary of Data Collection Regarding Appeals Processes and Recommendations for Appeals Process in Montana; Disqualifying Events Summary (Draft #2); and Administrative and Process Discussion Items.

Jeff noted a draft of the December meeting minutes were sent out for comment to the workgroup, and without discussion they were accepted.

Review of State Survey Questions Follow-up

Jill briefly went through the handout on the follow up calls to the ten states. Answers vary widely through the ten states. Jill stated that it was hard to find historical knowledge when it came to getting information regarding a States' legislative experience with bills.

The inclusion of the volunteer's in the definition was addressed again. Jeff said there will probably be language in the report that there was debate regarding whether or not to include them as a category that needs background checks. It was noted that 6 out of the 10 states require checks on volunteers. Ali Bovington at DOJ was going to look at establishing a low cost process to check volunteers. Jeff will follow up with her. There were also questions of volunteers under the age of 18. David Blade from DOJ said there was not much information DOJ would release on individuals under the age of 18.

The question was asked if we are just looking at the fingerprint check, or are we still considering the name based? Jeff said the language in the resolution talks about fingerprint checks, but the work group is still discussing that. David Blade from DOJ pointed out that a study done on name based checks showed 14% of people misrepresenting their names. There is also an increasing problem of identity theft. There is a concern of cost of fingerprint checks.

It was discussed what the report for the legislature might include. Jeff said a draft report will try to be drawn up for the next work group session for comments. The timeline is critical. Want to get it out for comment soon. The definitions the workgroup worked on during the previous meeting were discussed. It was suggested that the report include some narrative regarding the definitions to provide examples and elaborate more on who is affected by this definition. The workgroup did not include job titles in the definitions because they vary from provider to provider and service settings. The report needs to provide narrative that the intent was to include all staff that have access to a vulnerable individual, including but not limited to the Administrator, nursing staff, aides, housekeeping, dietary, maintenance, and administrative staff.

Rose Hughes indicated that she has received some email from association members and indicated that some facilities are nervous about the background requirement. She indicated that many facilities now use a private service to conduct background checks. There is a concern that they don't want something more expensive or more of a burden on providers. A discussion followed regarding private services for background checks and a possible problem that these private services have no regulation. A question was raised about creating a list of credible private services? Jeff indicated that the Department would try to get some information for the next meeting.

Discussion regarding the proposed Direct Care Access Employee Definition related to HCBS Waivers and Self Directed Programs. Work group discussed and debated the proposed changes for self direct services and HCSB waivers. Mike Hanshew explained there are two different kinds. One is purely self directed, where the consumer has an EIN. The second is a co-employment arrangement with an agency and the agency has the EIN number, but the consumer makes the staffing decisions. Mike thought all should be subject to background checks. Kelly Williams from SLTC was concerned that this may infringe on the right of consumer choice. Some members of the work group pointed out that it is still state money. It was agreed there still needed to be some discussion of these services.

Jeff proposed including the Child Care programs in the service settings. During the department research on an appeals process and the disqualifying events he thought it would be appropriate to include them in the service setting definitions. There was the discussion of adding Child Care back in. It was the consensus of the work group that that be done under separate legislation, even though the resolution says all services funded and regulated by the department. There are no child care advocates on the work group.

Discussion of Disqualifying Events – work of subcommittee

Subcommittee started working on list of disqualifiers. So far, 36 offenses are permanent disqualifiers, and 135 are other than permanent and/or aged out. The working definition of "other than permanent" is the employer has the option to hire the employee, knowing that the applicant/employee has a conviction on their record.

Discussed whether employers would prefer to make determinations on whether they can hire or not hire based on certain crimes or have the state give a yes or no hiring determination. There was also the discussion on whether PHHS (or whoever turns out to be the clearinghouse for the background checks) can inform the employer of information on the record that is not disqualifying. Would have to work out with DOJ what information could be released to employers.

Several workgroup members asked for more input from either DOJ or PHHS attorneys on what offenses should be disqualifiers. Hard to make a determination based on language in statute, and work group does not feel qualified. The work group also wants clarification on how to balance offenses from other states. Jeff said it unlikely DOJ would want the clearinghouse role but will have that discussion with them.

There was still some concern about the timeliness of getting a background check done. The estimate is 3% of background checks return some sort of hit, and those will take longer to process and verify.

There was concern from some work group members that there be some criteria that the employer would have to base a decision on. They would prefer a clear yes or no from PHHS. Jeff was going to check with DOJ to see what information on a rap sheet can be released to third parties (the employer). The three options Jeff agreed to write up are:

1. PHHS tells the employer whether or not they can hire the individual based on disqualifying offenses.

2. PHHS tells the employer whether or not they can hire the individual based on disqualifying offenses and in addition will tell the employer if there is an offense that is not disqualifying, but may cause some concern.
3. PHHS gives the employer all of the information of any offenses.

The work group briefly discussed a Grandfathered provision. It was commented that turn over rate are somewhere around 25-30% and within some services in the state it is reported to be as high as an 80%. Therefore, it would take only a couple of years before most staff would have background checks done.

Public Comment.

Donna Davis made a suggestion that the workgroup make a list of the permanent disqualifying felony convictions. Appeal here is limited to the accuracy of the criminal record. Any other felony conviction is subject to review, any disqualification must have a rational relationship to the job applied for. The appeal here is broader; it's allowed when there is a challenge to the exercise of discretion by the entity that determines the disqualification.

David Blade clarified that the RAP sheet will show everything, from arrests to court decisions to deferred sentences and dismissals. Permanent disqualifiers and name based checks make him nervous.

February 21, 2008

Discussion – Disqualifying Events and Appeals Process.

Jeff is going to get with DOJ and PHHS legal staff and identify what they want as permanent disqualifiers. Everything not on that list Jeff will bring back to the work group to decide what to do with. They will also look at other statutes to make sure offenses such as elder abuse and financial crimes are listed. Montana will need to create some method to benchmark Montana's list of crimes against other states. There was some discussion but not consensus on whether to have the disqualifier list in statute or rules.

There was debate about name based vs. fingerprint check. There were concerns about the cost and time involved with the fingerprint checks. And there was concern about not getting enough or correct information with the name based checks.

Four different options were provided to the work group based upon the discussion. It is apparent from the discussion that the group is divided on the appropriate method for background checks, with some favoring only a finger print process and others a less intrusive and costly process of name based checks, or some combination thereof. The options the work group identified and discussed are:

1. Full fingerprint check on designated service providers. FBI and WIN states.
2. Require a background check and state prescribes a process. Name based for Montana residents. If from a WIN state, must also do a WIN check. If from a state other than WIN, must do a FBI check.
3. Requirement for a check. Employer has Policies & Procedures to determine their process. DPHHS will explain possibilities, but employer decides how they do check; name based, private company, WIN state check for FBI check. Have minimum criteria. Expectations are that references are not enough. If from another state, Montana check alone is not enough.
4. Self disclosure (what we have now)

Options 1 and 2 have more protections for the facility. All of these options will still have a list of permanent disqualifiers. Department staff will work on a list of Pros and Cons for each option to be discussed at the next meeting.

Jeff discussed the administrative process outline that was prepared for the fingerprint checks. The timelines and grandfather provisions were identified as well as a registry. There was discussion about DPHHS setting up a registry system to see if a background check had been done on a potential employee. It would put an administrative burden on the department to create and maintain a registry but it would be useful for providers to help keep costs down. The department would not want the registry available to the public and would need to figure out a way to control access to the registry. Options one and two have the capability for a registry. The registry may speed up the hiring process.

There was still some concern about the turnover rate of certain staff, and getting background checks done every time they move. Jeff said the department wants to minimize the footprint on providers, have cost be minimal, and be efficient.

The workgroup did not reach consensus on funding. Jeff will bring some funding ideas to the next meeting.

Discussion – Appeals Process

There is already an appeals process through DOJ to appeal what is on a record. The workgroup needs to focus on the process for other appeals. The group agreed there had to be a process for appeal. There was debate on whether people could appeal on everything, or just things that are not considered permanent disqualifiers. There was also concern on how long the appeals process would take, employers may not wait a few months for the appeal to be decided.

The question was asked how many people appeal in other states. This information is not known. Becky, who handles the appeals for Child Care Licensing, says that due to a change in Rules she has more appeals now than ever. She has had around 25 in the last year, and of those, 4-5 went onto a hearing.

Department staff or an appointed commission could handle the appeals. There was some discussion that an appeals process could be handled entirely by DOJ. Jeff indicated that DOJ would handle the appeals for the content of the background checks but that DPHHS would need to handle the other appeals. DPHHS's initial proposal is to not have an agency appeals process similar to some other states as indicated in the handouts. The work group discussed this option and felt that the department needs to have some type of appeals process. Jeff indicated that he would have that discussion with the legal staff and the office of fair hearing and would come back with proposals for the group.

The work group also felt that this process needs to include some legal protections for both the state and the facilities from lawsuits if a waiver was granted and something happened to vulnerable individual.

The group discussed questions about the enforcement of statute that required background checks. How will we make sure facilities are doing background checks? Jeff indicated that it would likely be included in the survey process for healthcare facilities.

Public Comment.

James Driggers, SLTC. Thinks an appeal process is important. Anticipate people in self directed care to appeal more often, sometimes they do not have a lot of options. Encourages work group to endorse an appeal process.

Katie Spaid said as an employer, they would be too nervous to let someone work for the 30-90 days an appeal was being heard. It is too long to have somebody in the home providing care.

Jeff introduced Joe Wodnik and Dave Blade from DOJ. The group discussed the DOJ checks and processes. Joe said he would get the necessary information and get the answers back to the workgroup. There may be an audit process by the feds of the employers on how they handle the information they release.

Jeff said that if the work group cannot get consensus on the type of background checks process, the department will still go through with some sort of legislation. This however, still needs to be discussed with the Director and the Governor's Office.

There was a question on whether we are charged with creating a bill or making a recommendation to the committee. Jeff said we are putting together a report for the Director and the Governor and will make the determination on how to best proceed with legislation. The report will have draft legislation included. Jeff has had a brief discussion with Sue O'Connell about drafting. It was recommended we get comments from ACLU. Other legislators expressing interest are Carol Williams and Judy Schmidt.

Public Comment.

None.

Jeff will come back for process, timelines, and pros and cons regarding the options discussed.

The next meeting was supposed to be March 26-27. That is spring break week, and Jeff was hoping to meet on another date. Several work group members agreed to another date as they also did not realize this was spring break week. The department will send out different options to the workgroup for another date. Jeff, Jill or Becky will communicate with DLI on asking them about requiring background checks as part of licensing requirements.

Meeting was adjourned!

Department of Public Health & Human Services
Quality Assurance Division
SJ 7 Workgroup - Meeting #3
January 29th and 30th, 2008
Colonial Building -Wilderness Conference Room, Second Floor
2401 Colonial Drive
Helena, MT 59601

AMERICANS WITH DISABILITIES ACT:

The Department of Public Health and Human Services is committed to providing meeting access through reasonable accommodation under the Americans with Disabilities Act. Please contact the Quality Assurance Division office at 406-444-2099 prior to the proposed meeting date for further information.

Agenda

January 29, 2008

- 1:00 P.M. Welcome & Brief Summary of Last Meeting – Review & Approve Minutes
- 1:15 P.M. Review of State Survey Questions follow-up – (Jill Caldwell)
Discussion Direct Care Access Employee Definition - HCBS Waivers & Self Directed programs.
- 2:45 P.M. Break
- 3:00 P.M. Discussion - Disqualifying Events – work of subcommittee (Becky Fleming-Siebenaler)
- 4:30 P.M. * Public Comment
- 4:45 P.M. Summary and Adjourn

January 30, 2008

- 8:00 A.M. Discussion – Disqualifying Events & Appeals Process (Continued)
-Information from other States (Becky Fleming-Siebenaler)
- 10:00 A.M. Break
- 10:15 A.M. Continue - Discussion Appeals Process
- 11:45 A.M. * Public Comment
- 12:00 P.M. Break for lunch
- 12:30 P.M. Discussion – Process and Administrative Activities for a system of Criminal Background checks
- 2:30 P.M. * Public Comment
- 2:45 P.M. Summary & Review – Assignments/topics for next meeting (March 26th & 27th)
- 3:00 P.M. Adjourn

* Public Comment- In accordance with 2-3-103(1) MCA, the Department will hold a public comment period. Please note that this is the public's opportunity to address the work group on SJ 7.

SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers

10 State Summary of Data Collection Regarding Appeals Processes and Recommendation for Appeals Process in Montana

January 2008

10 State Summary:

1. 7 States have an identified Appeal Processes (Alaska, Arizona, Idaho, Minnesota, New Mexico, Oklahoma and Oregon)
 - a. 3 limit the appeal to crimes which fall outside of their 'permanent' categories.
 - b. 4 use a committee structure to make decisions, while the other three involve a Commissioner or other designated department staff person.
 - c. 1 state limits appeals to areas involving their central abuse registries.
2. 2 States (Kansas and Nevada) limit the appeal process to the accuracy of the criminal record only. No other considerations are allowed.
3. 1 State—no response, nothing specific found in their on-line statutes.

Recommendation:

In conducting this research project, the states who have adopted an appeal process appear to have an administratively burdensome process which requires the commitment of a committee or an agency commissioner or staff person. The process requires that individuals submit considerable amounts of information, documentation and supportive materials that must be reviewed by the committee, the commissioner or the department representative. These individuals alone are then responsible for weighing the information and determining whether to allow these persons to be employed in the respective facilities. Most decisions are made within a 30-45 day period.

The 2 states that limit their appeal process to the accuracy of the criminal record only appear to have fewer burdens upon the administrative entity than the other states.

Based upon this research, discussions with QAD management staff and agency legal counsel it is recommended that Montana, at least initially, follow the strategies of Kansas and Nevada and adopt a process which limits any 'appeal' to the accuracy of the criminal history record only.

In establishing this process, it is recommended that the challenge be sought through the Department of Justice and would only apply to the specificity or correctness of the information contained within the criminal record.

SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers

10 State Data Collection Regarding Appeals Processes January 2008

Alaska

- A. Appeals process is referred to as a *Request for Variance*.
- B. Appeals can only apply to crimes that are specified under the 10, 5, 3, or 1 year aged out categories. Appeals cannot be requested for those crimes listed as Permanent.
- C. Request for the variance is to be made by the 'entity' and is directed to state officials who will after a review refer and make a recommendation to grant or deny to a variance committee. This committee is appointed under Alaska state law.
- D. The request for variance must include information such as (1) a comprehensive rationale for why the variance should be granted; (2) a demonstration that in spite of the conviction, the health, safety and welfare of recipients will not be impacted; (3) copies of all known information relevant to (2) to include such things as copies of the criminal record, dispositions, final sentences, terms of parole or probation, etc; (4) letters of recommendation from credible persons (5) description of job duties and the extent to which the individual will have contact with persons receiving care.
- E. Variance Committee—3 or more department employees appointed by the Commissioner.
- F. Upon decision, the Commissioner notifies the entity or provider of the decision. In doing so, they do not identify the individual, but specify the crime or condition for which the variance was requested.
- G. The variance is only applicable to the entity who requested it. If the individual for whom the variance was granted leaves the employ of that entity, and seeks employment for another entity, a new variance must be requested. If they remain employed with the same entity for which the variance was granted, the variance remains in place.

Arizona

- A. Appeal process is known as *Good Cause Exception*.
- B. Every 'clearance' is based upon the issuance of a Fingerprint Clearance Card.
- C. Clearance is sought through the Board of Fingerprinting, which is part of the state Department of Public Safety.
- D. It appears that this division has a 'clearing house' system and compares the criminal record to the offenses that preclude a person from receiving a fingerprint clearance card.
- E. Individuals who want to work in a facility must present the fingerprint clearance card before they can be approved to work.
- F. Individuals who have been convicted of a crime outlined as a disqualifier, or those awaiting trial on the disqualifiers are precluded from receiving the clearance card except that the person may petition the board of fingerprinting for a good cause exception.
- G. The board of fingerprinting or its hearing officer shall determine if good cause exceptions can be granted.
- H. The board and its hearing officer will grant a good cause exception if the person shows to the board and HO's satisfaction that the person (1) is not awaiting trial or been convicted of a disqualifying crime or (2) that the person is successfully rehabilitated and is not a recidivist.
- I. Before granting a good cause exception the following is considered:
 - 1. The extent of the criminal record
 - 2. The length of time that has elapsed since the offense was committed
 - 3. The nature of the offense
 - 4. Any applicable mitigating circumstances

5. The degree to which the person participated in the offense
6. The extent of the person's rehabilitation. This would include completion of probation, parole, or community supervision, whether restitution was paid and evidence of positive action to change criminal behavior (such as completing a drug treatment program), and personal references attesting to the persons rehabilitation.

Kansas

The State of Kansas does not have an appeal process. There has so far been sort of a conscious effort to avoid establishing any type of appeals process. Kansas allows the individual to follow the appeal process established through the criminal justice legal system. If they are successful in getting a conviction overturned or expunged then officials will rescind the prohibition. Kansas does see a few criminal records that have been expunged each year on individuals that have been previously prohibited.

Idaho

- A. Appeals process is referred to as ***Exemption Reviews***
- B. An individual can only request a review of a conditional denial (this would be like what we're referring to as "other than permanent" disqualifier). If a disqualifier falls into the '*unconditional*' category, Idaho does not allow a review to occur.
- C. The review may consist of examining documents and supplemental information provided by the individual, a telephone interview, an in person interview or any other review the department deems necessary.
- D. Factors Considered at Exemption Review:
 1. The severity or nature of the crime or other findings;
 2. The period of time since the incident under view occurred;
 3. The number and pattern of incidents;
 4. Circumstances surrounding the incident that would help determine the risk of repetition;
 5. Relationship of the incident to the care of children or vulnerable adults;
 6. Activities since the incident, such as continuous employment, education, participation in treatment, payment of restitution, or any other factors that may be evidence of rehabilitation;
 7. Granting of a pardon by the Governor or President; and
 8. The falsification or omission of information on the application form and other supplemental forms submitted.
- E. **Exemption Review Determination:** The department determines the individuals suitability based upon the information provided during the exemption review.
- F. The department's exemption review decision is effective for 3 years from the date of the notice decision.
- G. Exemption Reviews may be appealed under Idaho's Contested Case Proceedings rules.
 1. Filing this notice does not 'stay' the action of the department.
 2. The individual who appeals must establish that the department's denial was arbitrary and capricious.
- H. Any individual who has had a denial under the exemption review within the previous 3 years will be automatically denied.

Minnesota

- A. Appeals process is referred to as ***Reconsideration***.
- B. Minnesota, depending upon the program, has several sources who make the disqualification determination—county agency, Commissioner of State Department, and private agencies (i.e., adoption...). *However the Commissioner is the only one that makes the decision to offer reconsideration. The Commissioner not only reviews criminal disqualifications, but also reviews disqualification concerning Maltreatment (is similar to*

our child and family services reviews) and disqualification concerning adoption/foster care family studies.

- C. The disqualified individual can request reconsideration on the following basis and must submit the following information showing that:
1. Information relied upon in making the disqualification was incorrect;
 2. The subject must show they pose no risk of harm to any person they would serve.
 3. The subject must specify which program they are applying for employment and this information must be included in the request for reconsideration.
- D. Review and Action of a Reconsideration Request
1. If the information was inaccurate, a decision to rescind the disqualification is made.
 2. If RISK is the criterion being used, commissioner must give preeminent weight to the safety of each person served. The disqualification can be set aside if the commissioner finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm. In making this consideration, the commissioner considers:
 - a) the nature, severity and consequences of the event that led to the disqualification;
 - b) whether there is more than one disqualifying event;
 - c) the age and vulnerability of the victim at the time of the event;
 - d) the harm suffered by the victim;
 - e) vulnerability of persons served by the program;
 - f) the similarity between the victim and the persons served by the program;
 - g) the time elapsed without a repeat of the same or similar event.
 - h) documentation of successful completion by the individual, training or rehabilitation relevant to the event;
 - i) any other documentation relevant to reconsideration.
- F. Scope of the set aside decision
1. If a decision to set aside a disqualification is made, the individual remains disqualified but is able to have direct contact with persons being served. *This set aside decision is limited solely to the program specified in the request for reconsideration unless otherwise specified. In some cases, the set-aside may further be limited to a specific person receiving services.*
- G. Recision of set aside decision—The commissioner may rescind a previous set aside disqualification if new information comes to his/her attention indicating that the person now poses a risk of harm to persons being served. If such decision is made, appeal rights apply.
- H. Notice Requirements
1. notice the individual
 2. if decision was upheld and the disqualification was not set aside, notice must go to employing entity to immediately remove the individual from any position in which he/she has direct contact with persons receiving services.
- I. When disqualification is not set aside, the individual has the right to request a formal fair hearing.

Nevada

Upon receiving information from their Central Repository of Criminal Records, any employee or independent contractor who has been convicted of a disqualifying crime shall be terminated from employment or not allowed to begin employment. The only 'appeal' is regarding the accuracy of the criminal record. According to the state law information, if the individual in question has already begun employment when the disqualifying criminal history is found, that person has a

reasonable amount of time of not less than 30 days to correct the information. If the information cannot be changed or corrected, the person is terminated from employment.

New Mexico

- A. Appeals process is referred to as ***Administrative Reconsideration***.
- B. An individual who has received notification of a disqualifying criminal history record, may submit a written request for administrative reconsideration.
- C. The documentation submitted with the request for an administrative reconsideration may include the following:
 - 1. Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history was incomplete.
 - 2. The age of the individual at the time of each disqualifying conviction;
 - 3. Any mitigating circumstances when the offense was committed.
 - 4. Any court imposed sentence or punishment and if completed, the date of completion;
 - 5. Any successfully completed rehabilitation program since the offense;
 - 6. The individuals full employment history since the disqualifying convictions;
 - 7. Other relevant materials the individual may wish to submit.
- D. Reconsideration Proceeding:
 - 1. Intended to be an informal non-adversarial administrative review of written documentation.
 - 2. Conducted by a committee designated for that purpose; established by the department;
 - 3. This committee will issue determination based upon the completed request for reconsideration and all supporting documents submitted. Additional documentation can be requested by this committee.
- E. Factors in Making Determination:
 - 1. Must consider the Criminal Offender Employment Act (Section 28-2-1 through 28-2-6 of the NMSA
 - 2. Total number of disqualifying convictions;
 - 3. Time elapsed since last disqualifying conviction or since discharge of the sentence;
 - 4. Circumstances of the crime including whether violence was involved;
 - 5. Activities evidencing rehabilitation (substance abuse or other rehab programs);
 - 6. Whether conviction was expunged by the court or whether an unconditional pardon was granted;
 - 7. False or misleading statements about any conviction in the signed declaration;
 - 8. Evidence that the individual poses no risk of harm to the health and safety of care recipients; and
 - 9. age of the individual at time of the disqualifying conviction.
- F. Grounds for Reconsideration Clearance Determination:
 - 1. Clearance can be given when the request for reconsideration and the accompanying documentation clearly demonstrates that the individual has satisfied *one* of the following three grounds for such clearance:
 - a) Inaccuracy—the record inaccurately reflects a disqualifying conviction. Includes factual error, error in the departments application or use of the applicable criminal statute/standard, conviction that lacks a final disposition
 - b) No Risk of Harm—
- G. Allow for Employment pending clearance determinations UNDER STRICT SUPERVISION.

Oklahoma

- A. Licensed professionals are required as a condition of their license to undergo a criminal background check; as a result, Oklahoma limits background checks to persons designated as nurse aides and ‘non-technical’ workers.
- B. From the research conducted, it appears there is no formal appeal process with regard to criminal history disqualifiers, but the appeal process appears to apply to their abuse registry.
 - 1. Appears to be a process involving an Administrative Law Judge; if the findings of this administrative law judge are adverse, the individual can appeal through the district court.
- C. The statute does mention that persons addicted to any schedule I through V drug, shall not be employed unless the person produces evidence that he/she has successfully completed a drug rehabilitation program.

Oregon

- A. All crimes listed in the statute are considered ‘potentially’ disqualifying, regardless of their permanent or aged out status.
- B. When an individual applies to be an employee in a facility, he/she undergoes a “fitness determination”, which appears to include a review of the criminal record and other considerations. This is conducted by authorized entity which usually is the facility contact but can be the department in specific situations. If the individual does not have a criminal history, and the record check shows no other considerations, the individual can be approved.
- C. If the individual has a potentially disqualifying criminal history, or discloses potentially disqualifying history, the individual is placed on a probationary status pending the preliminary ‘fitness’ determination. This determination includes a review of the criminal history and a weighing test. As statute is read, this weighing test is a review conducted by one or more authorized designees in which known negative and positive information is considered to determine if a subject individual is approved or denied. Under the weighing test the following outcomes are present: Probationary, Approved, Restricted Approval or denial.
- C. Appears that two appeals are mentioned in the statutes:
 - 1. Dispute involving the criminal history—must go directly to the Oregon State Police, the FBI or other agencies reporting this information.
 - 2. Challenge of the fitness determination.
- D. Appeals regarding challenges of fitness determination follow a contested case hearing allowing for an informal administrative review. If the decision at this level is adverse to the individual, the individual may appeal to a more formal setting which involves an administrative law judge.

Washington

Information was not readily available within the research and review of Washington Statutes. Attempts to contact state level program persons was not successful.

DISQUALIFYING EVENTS SUMMARY (Draft #2)
SJ7 Workgroup

This summary represents the consensus of the workgroup activities from the December 2007 meeting and a January meeting of a subcommittee for identifying and defining the disqualifying events that would apply for Montana. In preparing this document, the department reviewed the 10 states specified by the workgroup and compared those disqualifiers to what exists in Montana law.

The workgroup began work and discussion on this list on December 5, 2007 and the preference was to identify permanent disqualifiers and disqualifiers that are a concern but are identified as other than permanent. The other than permanent disqualifiers would be discussed later regarding aging out of offenses, similar to the methodology used in other states. There was also brief discussion regarding appeals that the department staff was looking into for the January meeting. In the subcommittee meeting on January 21, 2008 the group identified an option of "reportable" events that would basically notify the employer that there was an item from the background check that the employer would want to be aware of and discuss with the employee in order to make an informed decision regarding employment or continued employment.

This document has not been completed regarding general consensus of the workgroup as several items noted as "TBD" need to be discussed. This discussion will occur at the January 29th and 30th meeting of the workgroup.

The "aged out offenses" are certain crimes considered a disqualifier for a designated number of years. Example: 5 years

In Montana, crimes fall into Felony or Misdemeanor level at the penalty phase. If jail time for the offense is one year or more then the crime is classified as a Felony. If the jail time for the offense is under one year, then the crime is classified as a Misdemeanor.

Montana Disqualifier List
January 2008

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
Chap 5--Offenses Against a Person			
PART 1 Homicide			
45-5-102. Deliberate homicide	X		
45-5-103. Mitigated deliberate homicide	X		
45-5-104. Negligent homicide	X		

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-5-105. Aiding or soliciting suicide	X		
45-5-106. Vehicular homicide while under influence	X		
PART 2 Assault and related offenses			
45-5-201. Assault		X	5 years
45-5-202. Aggravated assault	X		
45-5-203. Intimidation		X	5 years
45-5-204. Mistreating prisoners	X		
45-5-205. Negligent vehicular assault	X		
45-5-206. Partner or family member assault		X	5 years
45-5-207. Criminal endangerment		X	5 years
45-5-208. Negligent endangerment		X	
45-5-209. Partner or family member assault -- no contact order		X	5 years
45-5-210. Assault on peace officer or judicial officer	X		
45-5-211. Assault upon sports official		X	5 years
45-5-212. Assault on minor			TBD
45-5-213. Assault with weapon		X	5 years
45-5-214. Assault with bodily fluid		X	5 years
45-5-220. Stalking		X	5 years
45-5-221. Malicious intimidation or harassment relating to civil or human rights		X	5 years
45-5-223. Surreptitious visual observation or recordation			
PART 3 Kidnapping			
45-5-301. Unlawful restraint		X	5 years
45-5-302. Kidnapping	X		
45-5-303. Aggravated kidnapping	X		
45-5-304. Custodial interference		X	5 years
45-5-305. Subjecting another to involuntary servitude		X	5 years
45-5-306. Trafficking of persons for involuntary servitude	X		
PART 4 45-5-401. Robbery	X		
PART 5 Sexual Crimes			

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-5-502. Sexual assault	X		
45-5-503. Sexual intercourse without consent	X		
45-5-504. Indecent exposure	X		
45-5-505. Deviate sexual conduct.			TBD
45-5-507. Incest	X		
PART 6 Offenses Against the Family			
45-5-601. Prostitution		X	
45-5-602. Promoting prostitution	X		
45-5-603. Aggravated promotion of prostitution	X		Note: End of 12/5/07 discussion
45-5-611. Bigamy		X	Note: Subcommittee work 1/21/08
45-5-612. Marrying a bigamist		X	
45-5-621. Nonsupport		X	
45-5-622. Endangering welfare of children	X		
45-5-623. Unlawful transactions with children	X		
45-5-624. Unlawful attempt to purchase or possession of intoxicating substance		X	
45-5-625. Sexual abuse of children	X		
45-5-626. Violation of order of protection		X	
45-5-627. Ritual abuse of minor			TBD
45-5-631. Interference with parent-child contact		X	
45-5-632. Aggravated interference with parent-child contact		X	
45-5-634. Parenting interference		X	
45-5-637. Tobacco possession or consumption by persons under 18 years of age prohibited		X	
Chapter 6—Offenses Against Property			
PART 1 Criminal Mischief and Arson			

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-6-101. Criminal mischief	X		
45-6-102. Negligent arson	X		
45-6-103. Arson	X		
45-6-104. Desecration of capitol, place of worship, cemetery, or public memorial			TBD
45-6-105. Criminal destruction of or tampering with communication device			TBD
PART 2 Criminal trespass and burglary			
45-6-202. Criminal trespass to vehicles		X	
45-6-203. Criminal trespass to property		X	
45-6-204. Burglary			TBD
45-6-205. Possession of burglary tools			TBD
PART 3 Theft and Related Offenses	X		
45-6-301. Theft	X		
45-6-302. Theft of lost or mislaid property			TBD
45-6-303. Offender's interest in the property			TBD
45-6-305. Theft of labor or services or use of property			
45-6-306. Obtaining communication services with intent to defraud		X	
45-6-307. Aiding the avoidance of telecommunications charges		X	
45-6-308. Unauthorized use of motor vehicles		X	
45-6-309. Failure to return rented or leased personal property		X	
45-6-311. Unlawful use of a computer		X	
45-6-312. Unauthorized acquisition or transfer of food stamps		X	
45-6-313. Medicaid fraud	X		
45-6-314. Theft by disposal of stolen property		X	
45-6-315. Defrauding creditors		X	
45-6-316. Issuing a bad check.		X	
45-6-317. Deceptive practices			TBD
45-6-318. Deceptive business practices			TBD
45-6-319. Chain distributor schemes		X	

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-6-325. Forgery	X		
45-6-326. Obscuring the identity of a machine		X	
45-6-327. Illegal branding or altering or obscuring a brand		X	
45-6-332. Theft of identity	X		
45-6-341. Money laundering		X	
Chapter 7—Offenses Against Public Administration			
PART 1 Bribery and Corrupt Influence			
45-7-101. Bribery in official and political matters.		X	
45-7-102. Threats and other improper influence in official and political matters		X	
45-7-103. Compensation for past official behavior		X	
45-7-104. Gifts to public servants by persons subject to their jurisdiction		X	
PART 2 Perjury and Other Falsification in Official Matters			
45-7-201. Perjury.		X	
45-7-202. False swearing		X	
45-7-203. Unsworn falsification to authorities		X	
45-7-204. False alarms to agencies of public safety		X	
45-7-205. False reports to law enforcement authorities		X	
45-7-206. Tampering with witnesses and informants.		X	
45-7-207. Tampering with or fabricating physical evidence.		X	
45-7-208. Tampering with public records or information		X	
45-7-209. Impersonation of public servant		X	
45-7-210. False claim to public agency		X	
PART 3 Obstructing Governmental Operations			
45-7-301. Resisting arrest		X	
45-7-302. Obstructing peace officer or other public servant.		X	
45-7-303. Obstructing justice		X	
45-7-304. Failure to aid a peace officer.		X	
45-7-305. Compounding a felony		X	
45-7-306. Escape.		X	

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-7-307. Transferring illegal articles -- unauthorized communication		X	
45-7-308. Bail-jumping.		X	
45-7-309. Criminal contempt.		X	
PART 4 45-7-401. Official misconduct		X	
PART 5 45-7-501. Employer misconduct		X	
Chapter 8—Offenses Against Public Order			
PART 1 Conduct Disruptive of Public Order			
45-8-101. Disorderly conduct.		X	
45-8-102. Failure of disorderly persons to disperse		X	
45-8-103. Riot		X	
45-8-104. Incitement to riot.		X	
45-8-105. Criminal incitement.		X	
45-8-106. Bringing armed men into the state		X	
45-8-109. Civil disorder -- prohibited activities		X	
45-8-110. Obstructing health care facility access		X	
45-8-111. Public nuisance.		X	
45-8-112. Action to abate a public nuisance		X	
45-8-113. Creating a hazard		X	
45-8-114. Failure to yield party line		X	
45-8-115. Illegal posting of state and federal land		X	
45-8-116. Funeral picketing -- penalties		X	
PART 2 Offensive, indecent and inhumane conduct			
45-8-201. Obscenity			TBD
45-8-206. Public display or dissemination of obscene material to minors			TBD
45-8-209. Harming a police dog -- penalty		X	
45-8-210. Causing animals to fight -- owners, trainers, and spectators			TBD
45-8-211. Cruelty to animals -- exceptions			TBD
45-8-212. Criminal defamation		X	
45-8-213. Privacy in communications		X	
45-8-214. Bribery in contests		X	

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-8-215. Desecration of flags		X	
45-8-216. Unlawful automated telephone solicitation		X	
45-8-217. Aggravated animal cruelty			TBD
45-8-220. Criminal invasion of personal privacy.			TBD
PART 3 Weapons			
45-8-303. Possession or use of machine gun in connection with a crime	X		
45-8-304. Possession or use of machine gun for offensive purpose	X		
45-8-305. Presumption of offensive or aggressive purpose	X		
45-8-313. Unlawful possession of firearm by convicted person	X		
45-8-314. Lifetime firearms supervision of certain convicted persons	X		
45-8-316. Carrying concealed weapons		X	
45-8-318. Possession of deadly weapon by prisoner or youth in facility.	X		
45-8-327. Carrying a concealed weapon while under the influence.		X	
45-8-328. Carrying concealed weapon in prohibited place			TBD
45-8-331. Switchblade knives			TBD
45-8-333. Reckless or malicious use of explosives			TBD
45-8-334. Possession of a destructive device			TBD
45-8-335. Possession of explosives			TBD
45-8-336. Possession of a silencer			TBD
45-8-339. Carrying firearms on train -- penalty			TBD
45-8-340. Sawed-off firearm			TBD
45-8-361. Possession or allowing possession of weapon in school building			TBD
Chapter 9—Dangerous Drugs			
PART 1 Offenses involving Dangerous Drugs			TBD – Entire Section
45-9-101. Criminal distribution of dangerous drugs			
45-9-102. Criminal possession of dangerous drugs			
45-9-103. Criminal possession with intent to distribute			
45-9-104. Fraudulently obtaining dangerous drugs			

Montana Crimes	Permanent Disqualifier	Other than Permanent	Aged out offenses
45-9-105. Altering labels on dangerous drugs			
45-9-107. Criminal possession of precursors to dangerous drugs			
45-9-109. Criminal distribution of dangerous drugs on or near school property			
45-9-110. Criminal production or manufacture of dangerous drugs			
45-9-112. Criminal distribution of imitation dangerous drug			
45-9-113. Criminal possession of imitation dangerous drug with the purpose to distribute			
45-9-114. Criminal advertisement of imitation dangerous drug			
45-9-115. Criminal manufacture of imitation dangerous drug			
45-9-121. Criminal possession of toxic substances			
45-9-125. Continuing criminal enterprise			
45-9-127. Carrying dangerous drugs on train			
45-9-132. Operation of unlawful clandestine laboratory			
Title 61—Driving Under the Influence of Alcohol or Drugs (61-8-401)			
DUI			TBD
**Habitual Offender			TBD

Habitual Offender –DUI Title 61-8-732, MCA allows for certain treatment options depending upon the number of convictions. For example, a 1st time offender must be evaluated for chemical dependency and if found to be chemically dependent, must attend treatment. A 2nd or subsequent offense—the offender must attend treatment and is then monitored for at least one year. In these cases, the sentence is typically suspended.